

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

SCOTT N. JOHNSON,

No. CIV S- 04-2501 WBS GGH

Plaintiff,

vs.

MICHAEL AND AMY WHITING, et al.,

FINDINGS & RECOMMENDATIONS

Defendants.

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Plaintiff's motion for entry of default judgment against defendant Michael Whiting, filed August 26, 2005, was submitted on the record. Local Rule 78-230(h). Upon review of the motion and the supporting documents, and good cause appearing, the court issues the following findings and recommendations.

BACKGROUND

On November 23, 2004, plaintiff filed the underlying complaint in this action against defendants Michael and Amy Whiting, individually and doing business as Whiting's Oak Furniture, alleging defendants denied him access to their retail store in violation of the Americans With Disabilities Act and state law. The summons and complaint were personally

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1 served on defendant Michael Whiting, on December 20, 2004.<sup>1</sup> Fed. R. Civ. P. 4(e)(2). Pacific  
2 Atlantic Trading Co. v. M/V Main Express, 758 F.2d 1325, 1331 (9th Cir. 1985) (default  
3 judgment void without personal jurisdiction). Defendant has failed to file an answer or otherwise  
4 appear in this action. On August 2, 2005, the clerk entered default against defendant Michael  
5 Whiting, individually and dba Whiting's Furniture.

6 Notice of entry of default and the instant motion for default judgment and  
7 supporting papers were not served on defendant. If default judgment is sought against a party  
8 who has appeared in the action, the party must be served with written notice of the application  
9 for judgment at least three days prior to the hearing. Fed. R. Civ. P. 55(b)(2). As defendant  
10 Whiting never appeared in the action, there was no requirement that he be given notice of  
11 plaintiff's motion for default judgment. See LG Electronics, Inc. v. Advance Creative Computer  
12 Corp., 212 F. Supp. 2d 1171, 1174 (N.D. Cal., 2002). Plaintiff seeks an entry of default  
13 judgment in the amount of \$4,000.

#### 14 DISCUSSION

15 Entry of default effects an admission of all well-pleaded allegations of the  
16 complaint by the defaulted party. Geddes v. United Financial Group, 559 F.2d 557 (9th Cir.  
17 1977). The court finds the well pleaded allegations of the complaint state a claim for which  
18 relief can be granted. Anderson v. Air West, 542 F.2d 1090, 1093 (9th Cir. 1976). The  
19 memorandum of points and authorities and affidavits filed in support of the motion for entry of  
20 default judgment also support the finding that plaintiff is entitled to the relief requested. There  
21 are no policy considerations which preclude the entry of default judgment of the type requested.  
22 See Eitel v. McCool, 782 F.2d 1470, 1471-1472 (9th Cir. 1986).

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25 <sup>1</sup> The proof of service does not indicate service on Amy Whiting. Based on plaintiff's  
26 motion for default judgment, it is presumed that Amy is being dismissed from the action.  
Otherwise, an interlocutory partial judgment against Michael Whiting only would be improper.

1 In view of the foregoing findings, it is the recommendation of this court that:

2 1. Plaintiffs' motion for entry of default judgment be GRANTED as to Michael  
3 Whiting dba Whiting's Furniture. Judgment should be rendered in the amount of \$4,000.

4 2. Defendant Amy Whiting be dismissed from this action.

5 These findings and recommendations are submitted to the Honorable William B.  
6 Shubb, United States District Judge, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1).

7 Within ten days after being served with these findings and recommendations, any party may file  
8 written objections with the court and serve a copy on all parties. Such a document should be  
9 captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the  
10 objections shall be served and filed within ten days after service of the objections. The parties  
11 are advised that failure to file objections within the specified time may waive the right to appeal  
12 the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

13 DATED: 10/13/05

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15 /s/ Gregory G. Hollows

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GREGORY G. HOLLOWS  
17 UNITED STATES MAGISTRATE JUDGE

18 GGH:076

19 Johnson2501.def.wpd  
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